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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re S.G., a Person Coming Under the
Juvenile Court Law.

B208755

(Los Angeles County
Super. Ct. No. CK71250)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

Frederick G.,

Defendant and Appellant.

APPEAL from orders of the Superior Court of Los Angeles County, D. Zeke Zeidler, Judge. Affirmed in part, reversed in part and remanded.

Joseph D. Mackenzie, under appointment by the Court of Appeal, for
Defendant and Appellant.

Raymond G. Fortner, Jr., County Counsel, James M. Owens, Assistant
County Counsel, and William D. Thetford, Principal Deputy County Counsel, for
Plaintiff and Respondent.

Frederick G. (father) challenges the juvenile court's jurisdictional and dispositional orders. We find the jurisdictional order to be supported by substantial evidence and affirm it. We conclude the juvenile court applied the incorrect standard in fashioning its dispositional order and remand the case to the juvenile court to apply the correct standard.

FACTUAL AND PROCEDURAL BACKGROUND

Prior to their detention, S.G. and her half-siblings lived with their mother and her boyfriend, D.G., who was the father of S.G.'s younger sister. Dependency proceedings commenced on January 9, 2008 when S.G. was five years old and her half-siblings were one year and two months old. (Collectively, S.G. and her half-siblings are referred to as the children.) Father, the only appellant, is S.G.'s presumed father and was incarcerated at the time the dependency proceedings commenced. Following the detention, the children were placed in foster care. On April 24, 2008, they were moved to the care of their maternal great-aunt.

1. Welfare & Institutions Code Section 300 Petition¹

The Department of Children and Family Services (DCFS) filed an amended section 300 petition February 1, 2008. Count b-4, as subsequently sustained, alleged that: father "has failed to provide the child with the basic necessities of life including food, clothing, shelter and medical care. Such failure to provide for the child on the part of the father endangers the child's physical and emotional health and well being and places the child at risk of physical and emotional harm and damage." The court subsequently dismissed count g-1, which was supported by the same facts.

Mother and D.G., admitted the following allegations: (1) Mother and D.G. "have a history of domestic violence and engaging in violent altercations in the

¹ Undesignated statutory citations are to the Welfare & Institutions Code.

presence of the children consisting of [D.G.] striking and kicking mother and the mother biting and striking [D.G.] The mother failed to protect the children in that the mother continued to frequent [D.G.'s] home with the children, allowing [D.G.] unlimited access to the children. Such violent conduct by the mother and [D.G.] and the mother's failure to protect the children endangers the children's physical and emotional health and safety and places the children at risk of physical and emotional harm and damage"; and (2) D.G. "has a history of substance abuse and is a current user of PCP. [D.G.] tested positive for PCP on 01/10/2008. Further, mother . . . knew of [D.G.'s] PCP abuse and failed to protect [the children] by frequenting [D.G.'s] home and allowing [D.G.] unlimited access to the children. Said substance abuse by [D.G.] and failure to protect by mother . . . creates a detrimental home environment and places the [children] at risk of physical and emotional harm, damage, danger, physical abuse and failure to protect."

2. DCFS's Reports

The following information was reported by DCFS and considered by the juvenile court in making its jurisdictional and dispositional orders. Father was arrested on December 3, 2007, and his projected release date was August 9, 2009. According to mother, father "has never provided a dime for [S.G.]. He is in jail right now for gun charges and because he didn't pay my child support. He would come to my house and bust out my windows." Mother also stated that father hit her at the hospital.

According to D.G., "mother is unstable, bouncing from home to home." D.G. "did not allow mother [to] leave [his mother's] home . . . because [mother] did not have a stable place to live and was moving the children from house to house." Mother stated that she lived in D.G.'s mother's house because she did not want to go to a shelter. According to mother, she had nowhere else to live. S.G. did not like living with D.G.'s mother because "D.G. hits [S.G.] and my mom."

3. *Jurisdictional Hearing*

Mother and father testified at the jurisdictional hearing. Mother testified that D.G. hit S.G. once. She testified that the same day, in S.G.'s presence, D.G. threatened mother with a gun. Mother testified D.G. lived in the back house at the same location where D.G.'s mother lived. Mother commented that D.G. did not like "the environment that I lived in at home and we just disagreed about that." Father testified he was incarcerated for failing to attend his anger management classes.

Over father's challenge, the juvenile court sustained count b-4. The court dismissed count g-1, the only other count alleging conduct by father.

4. *Disposition Hearing*

At the dispositional hearing, mother testified that father was incarcerated for domestic violence against her and that father failed to finish his classes and failed to pay a fee to the domestic violence shelter. Mother testified father had seen S.G. only one to three times. Mother occasionally took S.G. to her paternal grandmother's house. Mother believed it would be harmful to separate S.G. from her siblings because S.G. was very close to her siblings.

Father testified about his incarceration and his relationship with S.G. According to father, the crime underlying his incarceration was domestic violence against mother that occurred in 2001. Father testified that his anticipated release date was August 1, 2009. Father acknowledged that he had never visited S.G. by himself. Initially, father stated that he had seen S.G. approximately one year earlier. But when asked whether the last time he saw his daughter was five years earlier father responded: "I mean like for . . . being there financially . . . being there as a father, but me visiting, I mean just going to see her, hanging out with her for two or three hours, that's -- that's not really no time to be a father" He testified that S.G.'s relationship with her paternal grandmother was "on and off."

Father wanted her to live with his mother because “I just like to get back . . . to be with my daughter.” He was concerned “someone in between that could be hurting her that we do not know about” Father was not concerned about S.G. being separated from her siblings. He did not believe it would have “an emotional [e]ffect on her” because she would have an opportunity to visit with her half-siblings.

Father requested a home placement with him, on condition S.G. stay with the paternal grandmother while he was incarcerated. Father’s attorney stated, “the first choice, it’s placement with the father. He’s making a plan.” S.G.’s attorney requested S.G. remain placed with her maternal great-aunt and stated that S.G. told him she would like to stay with her siblings.

The juvenile court recognized father was seeking custody, stating “[h]e is seeking custody. He would like the child [in the] home of father, with him making arrangements with his own mother to have the child.” But the court concluded it was not “doing a home of father with the father making arrangements” but instead was “suitably placing” S.G. The court said it would determine “which person is in the best interest of the child” and rejected the argument that it must find placement with father to be detrimental to S.G. before placing her elsewhere.

The court indicated “there’s no reason to . . . [t]ake this child from a relative who she has a . . . relationship to and where she can be with her siblings.” The court reasoned that “the child has a closer relationship to the maternal great aunt, which even the father can concede and . . . the child is able to be with the siblings there who the child has a close relationship with and has lived with siblings since the siblings[’] birth.” The court found that father’s lack of concern that S.G. would be separated from her siblings “actually adds to why he needs to be in parenting education and childhood development.” The court ordered S.G. to remain placed in the home of her maternal great-aunt with her siblings.

DISCUSSION

When a juvenile court takes jurisdiction under section 300, it must conduct a dispositional hearing. (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 248.) Both jurisdictional and dispositional orders are appealable. (*Ibid.*) Father challenges both orders. We first consider his argument that the record lacks sufficient evidence to support the jurisdictional allegations *against him*. We then discuss his claim that the court should have placed S.G. with her paternal grandmother.

1. *Sufficient Evidence Supports the Juvenile Court's Jurisdictional Order*

Father does not and cannot challenge the juvenile court's jurisdiction over S.G. A jurisdictional finding good against one parent is good against the other. The children are dependents of the juvenile court if the actions of either parent bring them within one of the statutory definitions of a dependent. (*In re James C.* (2002) 104 Cal.App.4th 470, 482.) Nevertheless, because of the potential impact of the juvenile court's findings on its subsequent orders, we consider father's jurisdictional challenge to the findings against him. (*In re John S.* (2001) 88 Cal.App.4th 1140, 1143.) In reviewing the sufficiency of the evidence, the appellate court must make all reasonable inferences which support the findings and view the record in the light most favorable to those findings. (*In re Tania S.* (1992) 5 Cal.App.4th 728, 733.) If the evidence viewed in that light is sufficient, the juvenile court's determination must be affirmed. (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 820.)

Father challenges the evidence supporting the allegations against him under section 300, subdivision (b). That statute provides that the juvenile court may adjudge a child a dependent of the juvenile court when the child "has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness,

as a result of the failure or inability of his or her parent or guardian to . . . provide the child with adequate food, clothing, shelter, or medical treatment No child shall be found to be a person described by this subdivision solely due to the lack of an emergency shelter for the family.” (§ 300, subd. (b).) Exercise of dependency court jurisdiction under section 300, subdivision (b) is proper when three elements are proven: “(1) neglectful conduct by the parent . . . (2) causation; and (3) ‘serious physical harm or illness’ to the minor, or a ‘substantial risk; of such harm or illness.’” (*In re Rocco M.*, *supra*, 1 Cal.App.4th at p. 820.)

It cannot reasonably be disputed that father did not support S.G. and failed to provide her with the basic necessities of life. Mother stated father “has never provided a dime for her.” Father provided no evidence that he supported S.G., and he testified that there was “no time to be a father”

Father argues his failure to support S.G. did not cause serious physical harm or the substantial risk of such harm to her. We disagree. First, mother and D.G. admitted that mother’s “frequenting” D.G.’s home placed S.G. at risk of emotional harm, damage, danger, and physical abuse. Mother returned to D.G.’s mother’s home where D.G. lived in the back house because she had nowhere else to live. S.G. reported she did not want to live there because D.G. hit her and mother. Mother confirmed that D.G. hit S.G. Mother’s acknowledgement that she lived at D.G.’s mother’s home because she lacked shelter, coupled with S.G.’s comments that D.G. hit her, demonstrate that S.G. was at risk of physical injury because mother lacked shelter.

Contrary to *In re Matthew S.* (1996) 41 Cal.App.4th 1311, 1320, where there was “no evidence of malnutrition, deprivation of shelter, clothes or medical care,” here there was evidence of deprivation of shelter sufficient to sustain the allegations against father. This case is more like *In re James C.*, *supra*, 104 Cal.App.4th at pages 482-483, where the noncustodial incarcerated parent’s

failure to provide the basic necessities of life posed a substantial risk of serious physical harm, even though the custodial parent's conduct was the catalyst for the dependency petition. Here, there was evidence that father's failure to provide triggered mother's inadequate living conditions, which placed S.G. at risk of physical abuse.²

2. *The Juvenile Court's Dispositional Order was Based on an Incorrect Standard*

"Section 361.2 governs placement when the child has a parent 'with whom the child was not residing at the time that the events or conditions arose that brought the child within the provisions of Section 300.' [Citation.] It directs that before the child may be placed in out-of-home care, the court must first consider placing the child with the noncustodial parent, if that parent requests custody." (*In re Adrianna P.* (2008) 166 Cal.App.4th 44, 55, italics & fn. omitted; see also *In re R.S. v. Superior Court* (2007) 154 Cal.App.4th 1262, 1270 [section 361.2 applies to noncustodial parent].) "If [the noncustodial] parent requests custody, the court 'shall place' the child with the parent unless 'it finds that placement with that parent would be detrimental to the minor.' [Citation.]" (*In re Marquis D.* (1995) 38 Cal.App.4th 1813, 1820-1821.) "If the court determines the child's placement with the noncustodial parent would be detrimental to the child's safety, protection, or physical or emotional well-being, the court is required to order the care,

² Father's argument that the court found no evidence to sustain an allegation under section 300, subdivision (g) is irrelevant. The only question is whether substantial evidence supports the finding under section 300, subdivision (b), the only allegation found true by the juvenile court. In contrast to subdivision (b), subdivision (g) requires: "[T]he child's parent has been incarcerated or institutionalized and cannot arrange for the care of the child; or a relative or other adult custodian with whom the child resides or has been left is unwilling or unable to provide care or support for the child, the whereabouts of the parent are unknown, and reasonable efforts to locate the parent have been unsuccessful."

custody, and control of the child to be under the supervision of the social worker. [Citations.]” (*In re Adrianna P.*, *supra*, 166 Cal.App.4th at p. 55.) The foregoing rules apply regardless of whether the noncustodial parent was offending or nonoffending. (*In re V.F.* (2007) 157 Cal.App.4th 962, 970.) They have also been held to apply where a noncustodial parent is incarcerated. (*Id.* at p. 971; *In re Isayah C.* (2004) 118 Cal.App.4th 684, 700 [incarcerated parent may have custody “even while delegating the day-to-day care of that child to a third party for a limited period of time” where parent is able to make appropriate arrangements for child’s care during the parent’s incarceration, and such placement is not otherwise detrimental to the child].)

The juvenile court recognized: Father “is seeking custody. He would like the child [in the] home of father, with him making arrangements with his own mother to have the child.” Because the trial court applied the “best interest” standard instead of determining whether S.G. would suffer detriment from a placement with father, the case must be remanded to the trial court to apply the appropriate standard. (*In re V.F.*, *supra*, 157 Cal.App.4th at p. 974.) In applying this standard, “the court may consider any jurisdictional findings that may relate to the noncustodial parent under section 300, as well as any other evidence showing there would be a protective risk to the child if placed with that parent.” (*Id.* at p. 970.) While the result may not be different and while the court may consider S.G.’s sibling relationships (*In re Luke M.* (2003) 107 Cal.App.4th 1412, 1423), the juvenile court must apply the correct standard.³

³ There is no merit to respondent’s argument that father could not and did not request physical custody. Nor is there merit to respondent’s distinction between an offending and nonoffending noncustodial parent. (*In re V.F.*, *supra*. 157 Cal.App.4th at p. 969, fn. 4.)

DISPOSITION

The juvenile court's jurisdictional order is affirmed. The juvenile court's dispositional order is reversed. The case is remanded to the juvenile court.

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MANELLA, J.

We concur:

WILLHITE, Acting P. J.

SUZUKAWA, J.